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No. 99 - 15

IN THE

Supreme Court of the United States

October Term, 1998

RONALD H. BLACKLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that, under the facts presented, this prosecution was "related to" the Independent Counsel's original grant of jurisdiction, so as to give the Independent Counsel jurisdiction to prosecute the petitioner.

2. Whether the court of appeals erred in finding harmless under the facts of this case, the trial court's failure to instruct the jury that it had to find a duty to disclose to convict under the concealment prong of 18 U.S.C. § 1001.

3. Whether the court of appeals erred in finding that the district court did not abuse its discretion by departing from the Sentencing Guidelines based upon the facts of this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 167 F.3d 543.

JURISDICTION

The court of appeals issued its decision on January 26, 1999, and denied petitioner's timely petition for rehearing on March 31, 1999. The petition for writ of certiorari was filed on June 28, 1999, and was placed on the Court's docket on the same day. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Independent Counsel Donald C. Smaltz, representing the United States, is responsible for investigating allegations of unlawful activity by former Secretary of Agriculture

Alphonso Michael Espy.[1] Petitioner, Ronald Blackley, was Espy's Chief of Staff at the United States Department of Agriculture ("USDA") during 1993 and part of 1994. After a jury trial in the United States District Court for the District of Columbia, petitioner was convicted on one count of submitting a false Executive Branch Public Financial Disclosure Form while serving as Espy's Chief of Staff and two counts of making false statements to inspectors general concerning his receipt of over $22,000 from persons having business before the USDA, all in violation of 18 U.S.C. § 1001. He was sentenced to 27 months imprisonment, to be followed by three years supervised release. The court of appeals affirmed his convictions and sentence. Pet. App. 1a-20a.

1. On September 7, 1994, the D.C. Circuit Special Division for the Purpose of Appointing Independent Counsel ("Special Division"), acting upon request of the United States Attorney General, appointed Donald C. Smaltz independent counsel to investigate allegations that then-Secretary of Agriculture Espy had accepted things of value from persons and companies with business pending before the USDA. The order of appointment granted the Independent Counsel

> full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether [Secretary Espy] has committed a violation of any federal criminal law . . . relating in any way to the acceptance of gifts by him from organizations or individuals with business pending before the Department of Agriculture.

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[1] Independent Counsels appointed pursuant to the Ethics in Government Act have the express statutory authority to initiate and conduct prosecutions "in any court of competent jurisdiction," and that authority includes "handling all aspects of any case, in the name of the United States." 28 U.S.C. § 594(a)(9).

Order Appointing Independent Counsel. Resp. App. 1A-2A. The Special Division also granted the Independent Counsel full authority to:

> [I]nvestigate other allegations or evidence of violations of any federal criminal law . . . by any organization or individual developed during the Independent Counsel's investigation . . . and connected with or arising out of that investigation.
>
> [S]eek indictments and prosecute any organizations or individuals involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters . . . .
>
> [F]ully investigate and prosecute the subject matter with respect to which the Attorney General requested the appointment of independent counsel . . . and all matters and individuals whose acts may be related to that subject matter. . . .

Resp. App. 2A.

In April of 1996, the Special Division clarified the scope of this jurisdictional grant by referring to the Independent Counsel as a "related matter"

> the jurisdiction and authority to investigate and prosecute any violation of any federal law. . . related to any application, appeal, or request for subsidy made to or considered by the United States Department of Agriculture, for which Secretary of Agriculture Alphonso Michael (Mike) Espy and/or his Chief of Staff Ronald Blackley intervened in the application, approval, or review process.

Resp. App. 4A. In so doing, the Special Division reviewed an extensive factual record, wrote an opinion explaining its reasoning, and concluded that the matter was "demonstrably related to the factual circumstances that gave rise to the Attorney General's initial investigation and request for

appointment of an independent counsel." *In re Espy*, 80 F.3d 501, 509 (D.C. Cir., Spec. Div. 1996).

2. The Independent Counsel subsequently obtained a three count indictment against petitioner charging three violations of 18 U.S.C. § 1001. The indictment alleged that while serving as Chief of Staff under Secretary Espy at the USDA, petitioner received more than $22,000 from individuals regulated by the USDA, and then lied about it on three separate occasions — on his Executive Branch Public Financial Disclosure Form, SF-278, (Count 1), and in two sworn statements to the inspectors general of the USDA and the United States Agency for International Development (Counts 2 and 3). Pet. App. 3a.

During a seven day jury trial, the government presented evidence that, while serving as Chief of Staff under Secretary Espy at the USDA, petitioner received ten checks totaling $21,025 from one individual who was regulated by, and received federal subsidies from, the USDA.[2] The evidence further showed that petitioner received one check in the amount of $1,000 from another individual with business before the USDA shortly after petitioner intervened in the USDA's determination of the amount of subsidies that individual should receive.[3]

Petitioner subsequently concealed his receipt of these funds on three occasions. As a high-level executive branch official, petitioner was statutorily required to submit annually a public financial disclosure form, or SF-278, which obligated petitioner to disclose, *inter alia*, income and gifts received

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[2] *See* Govt. C.A. Br. 9, 39 n.18 (citing 11/19/97 Tr. Vol.2 at 63-68, 73, 100, 105; 11/20/97 Tr. Vol.2 at 189, 196; Govt. Exs. 4, 16, 17, 19, 20, 23, 25, 26, 27, 29, 31, 32(a)-(c), 32(f)).

[3] *See* Govt. C.A. Br. 9-11 (citing 11/19/97 Tr. Vol.2 at 27-87; 11/20/97 Tr. at 27; 11/21/97 Tr. at 8, 28-39, 144-50; Govt. Exs. 3(a), 22, 24, 30).

during that calendar year. Govt. Ex. 34.[4] Petitioner disclosed none of the $22,025 identified above. Govt. Ex. 33. Subsequently, two separate investigations of petitioner were undertaken by offices of inspectors general. During both investigations, petitioner signed sworn statements asserting, in substance, that after he entered government service he received no remuneration of any kind from sources such as the two individuals above. Pet. App. 3a-4a.

At the close of the evidence, the district court charged the jury in full accord with the statutory language of 18 U.S.C. § 1001. The court did not identify as an element of the concealment prong of section 1001 the requirement that the defendant be under an obligation to disclose the information he concealed. The jury convicted petitioner on all three counts.

At sentencing, the district court found that it should sentence petitioner under the fraud guideline, U.S.S.G. § 2F1.1, and after an enhancement for more than minimal planning, U.S.S.G. § 2F1.1(b)(2)(A), arrived at a offense level of eight. It then made an eight-level upward departure, relying on several factors not considered by the guidelines. These factors included: (1) the defendant was a high-level government official when he received monies from individuals with business before the USDA; (2) he had been informed that he was not allowed to receive such payments; and (3) he twice lied under oath about their receipt to investigators who were looking into his conduct. Pet. App. 173a-174a, 184a-186a. The district court sentenced petitioner to 27 months imprisonment.

3. On appeal, petitioner argued *inter alia* that the Independent Counsel lacked jurisdiction to prosecute him because the facts underlying his indictment were not "related

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[4] Title I of the Ethics in Government Act of 1978, as amended (the 'Act'), 5 U.S.C. App. § 101 et seq., requires the reporting of this information. (Govt. Ex. 34).

to" the Independent Counsel's original jurisdictional mandate. The court of appeals rejected petitioner's argument. The court determined that the authority granted to the Independent Counsel by 28 U.S.C. § 593(b)(3) and his original mandate to look into matters "related to" the core areas of the initial inquiry, allowed the Independent Counsel "to pursue crimes by the original target's close associates in the field of activity under investigation, including crimes that either are of the same sort as the originally specified set of crimes or are ancillary to the commission or concealment of such crimes." Pet. App. 9a-10a. The court then determined, based upon petitioner's position, duties, alleged offenses, and the connection of each to the allegations against Espy, that the petitioner's prosecution was "related to" the original mandate. Pet. App. 10a.[5]

With respect to Count 1 only, petitioner also contended before the appeals court that the Independent Counsel violated 28 U.S.C. § 594(f)(1) by failing to follow a provision in the United States Attorneys' Manual that supposedly discourages prosecuting those who submit false financial disclosure forms under 18 U.S.C. § 1001.[6] The court rejected this argument, concluding that the United States Attorneys' Manual does not confer substantive rights on petitioner, just as it does not confer such rights to any individual charged by a United

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[5] This determination was in accord with the Special Division's referral to the Independent Counsel as a "related matter" jurisdiction to investigate and prosecute "any violation of any federal law . . . related to any application, appeal, or request for subsidy made to or considered by the [USDA], for which Secretary of Agriculture Alphonso Michael (Mike) Espy and/or his Chief of Staff Ronald Blackley intervened in the application, approval, or review process." In so doing, the Special Division was "interpreting but not expanding" the Independent Counsel's original prosecutorial jurisdiction. *In re Espy*, 80 F.3d at 507.

[6] The provision in question directs prosecutors "not to prosecute an [Ethics in Government Act] violation under section 1001 unless the nondisclosure conceals significant underlying wrongdoing." Pet. App. 32a. In rejecting Blackley's argument, the district court did not determine that the prosecution, in fact, violated DOJ policy. Pet. App. 36a n.1.

States Attorney's Office. Pet. App. 11a-12a. Section 594(f)(1), the court concluded, is enforced through other means. *Id.* at 12a.

Petitioner next asserted that his conviction must be reversed because the trial court did not instruct the jury that in order to convict under the concealment prong of section 1001, the jury had to first find that he owed a duty to disclose the information he concealed. *Id.* at 15a. The court of appeals noted that some circuits had held that a duty to disclose must be proven under this prong but questioned whether it was an issue for the jury. *Id.* at 16a. The court, however, did not reach this issue. Instead, it concluded that if any error occurred, it was harmless. The court reasoned that, as to the false statement on the Executive Branch Public Financial Disclosure Form (Count 1), it was inconceivable that the jury could have found petitioner guilty without also finding that he had a duty to disclose. *Id.* at 16a-17a. As to the false statements to inspectors general (Counts 2 and 3), the court determined that no rational jury could have found petitioner guilty under the concealment prong of section 1001 without simultaneously finding that he made affirmatively false statements, violating the second prong of section 1001, which was also charged in each count. *Id.* at 17a.

Lastly, petitioner challenged his sentence, arguing that the district court's eight-level departure from the Sentencing Guidelines was improper. The court of appeals rejected petitioner's challenge and affirmed the sentence. The court determined that the district court's departure was based on a mix of factors, including: (1) the defendant was a high-level official when he received monies from individuals regulated by the Agriculture Department; (2) he was informed that he was not allowed to receive such payments; and (3) he twice lied under oath about their receipt. Pet. App. 18a. The court of appeals concluded that the fraud guideline (U.S.S.G. § 2F1.1) did not adequately take these factors into account and the departure was, therefore, within the district court's discretion

allowed under *Koon v. United States*, 518 U.S. 81, 98 (1996). *Id.* at 18a-19a.

ARGUMENT

Petitioner presents no matters meriting review by this court. None of the issues presented by petitioner raise an important federal question or present a circuit conflict, because in each instance the court of appeals correctly identified and applied the controlling law. Petitioner's arguments simply dispute the application of that law to the peculiar facts of his case — claims not worthy of review by this Court. The Petition should therefore be denied.

I. The Jurisdiction Issue Does Not Merit Certiorari Review

Petitioner first urges this Court to review the determination below that the Independent Counsel had jurisdiction to prosecute him. Pet. 10-17. He identifies nothing in the court of appeal's decision meriting certiorari review.

1. Petitioner's jurisdictional challenge is, at its core, simply a request that this Court review the determination that, under the facts of this case, his prosecution was "related" to the Independent Counsel's original mandate. Petitioner does not allege that the original grant of jurisdiction to the Independent Counsel is unconstitutional or otherwise infirm. Rather, he claims only that the facts of the present prosecution do not fit within the boundaries of that jurisdiction. Pet. 11-14. This fact-based challenge does not warrant certiorari review.

Petitioner presented this same jurisdictional challenge to the courts below. In response, the court of appeals identified the appropriate standard from 28 U.S.C. § 593(b)(3), concluding that the present indictment was valid if it "related to" the subject matter with respect to which the Attorney General requested the appointment of the independent counsel. Pet. App. 8a. The court then undertook the requisite

factual inquiry and determined that the underlying facts of petitioner's offense were sufficiently related and fell "squarely within the limits" of the Independent Counsel's jurisdiction. Pet. App. 10a. As the court explained:

> The position description for Blackley as Chief of Staff to Secretary Espy characterized him as the Secretary's "alter ego,"; and he played that role in the very activity — running the Department — in which Espy's alleged offenses were committed. His alleged non-disclosures were of sums received from parties doing business with the Department, thus paralleling the Espy allegations. Furthermore, concealment of such receipts, especially in the context of a financial disclosure form intended to bring suspicious influences to the surface and in response to questions of inspectors general, tends not only to prevent discovery of underlying crimes such as receipts of bribes and gratuities, but also to reflect the perpetrator's consciousness of guilt in those receipts.

Id. Thus, the court concluded that

> the relation between Blackley's § 1001 violations and the core charges set out in the original order is tight enough to meet the "related to" criterion of § 593(b)(3) and the [appointment] order itself.

Id. at 11a.

Petitioner does not contend that the court of appeals applied the wrong standard; indeed, he concedes that the "related to" standard governs resolution of his jurisdiction challenge. *See* Pet. 10-14 (arguing that his indictment does not "relate to" the independent counsel's original mandate). Rather, he simply advances his own view that the facts underlying his prosecution are not sufficiently related to the original jurisdictional mandate, a fact-based proposition rejected by the D.C. Circuit and not meriting certiorari review.

Petitioner suggests that the court of appeals incorrectly applied the "relatedness" test, insisting that "[t]he Circuit Court discusses the meaning of the word 'relation' in the context of the relationship between Espy and Mr. Blackley, as opposed to the crime that is the subject of the mandate." *See* Pet. 11-12. But the D.C. Circuit did not so limit its analysis. The court found a close relationship between not only Espy's and Blackley's positions, but the criminal allegations levied against them as well. Specifically, the court concluded that "[Blackley's] alleged non-disclosures were of sums received from parties doing business with the Department, thus paralleling the Espy allegations." Pet. App. 10a.

Petitioner does not cite any legal authority to support his claim that the circuit employed an erroneous "relatedness" test nor does he identify a circuit split. This issue does not merit certiorari review.

2. Petitioner further asserts that the Independent Counsel violated Department of Justice ("DOJ") policy in contravention of 28 U.S.C. § 594(f)(1). Pet. 14-17. His argument on this point is puzzling because it has little to do with the court of appeals' decision which did not address the merits of this argument, but rather concluded that there is no substantive right to enforce DOJ policies. Pet. App. 11a-13a.[7] Petitioner could hardly suggest that this holding created a circuit conflict as the circuit courts have uniformly held that the DOJ Manual confers no enforceable rights. *See, e.g.*, *United States v. Booth*, 673 F.2d 27, 30 (1st Cir. 1981); *United States v. Schwartz*, 787 F.2d 257, 267 (7th Cir. 1986); *United States v. Busher*, 817 F.2d 1409, 1411 (9th Cir. 1987); *United States v. Kember*, 648 F.2d 1354, 1370 (D.C. Cir. 1980).

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[7] The court of appeals did not address the trial court's determination that proscribing this Independent Counsel prosecution would be "inconsistent with the purposes of the Independent Counsel statute" and was, therefore, not in violation of section 594(f)(1). Pet. App. 36a n.1, 38a.

Petitioner's argument that "[t]he Circuit's opinion cavalierly dismisses the statutory requirement that an independent counsel follow DOJ policy . . .," Pet. 16, ignores the text of the court of appeals' opinion. That opinion quotes the relevant statutory language (28 U.S.C. § 594(f)(1)), Pet. App. 11a, reviews the statute's purpose and pertinent legislative history, *id.* at 12a, and concludes that the consequences of an independent counsel's failure to follow DOJ policy do not include reversal of a properly obtained conviction. *Id.* at 12a-13a. "Nothing in the . . . Ethics in Government Act suggests that the defendant should be able to escape a sanction otherwise due." *Id.* Petitioner presents no support for a contrary result.

Petitioner presents neither an important federal question nor a circuit conflict. His request for certiorari review should be denied.

II. The "Duty to Disclose" Instruction Issue Does Not Merit Certiorari Review

Petitioner asserts that the court of appeals erred in upholding his convictions where the jury was not specifically instructed that it had to find a duty to disclose before it could convict him under the concealment prong of section 1001. Pet. 17-21. The court of appeals held that, under the facts of this case, the district court's refusal to give petitioner's proposed jury instruction that it had to find a duty to disclose, if error, was harmless. Pet. App. 16a-17a. Petitioner presents no reason for review of this factual determination.

Notably, petitioner devotes almost three pages of his petition (Pet. 17-20) arguing two legal issues not addressed by the court of appeals. Citing numerous circuit decisions, petitioner first argues that, although 18 U.S.C. § 1001 does not explicitly require proof of a duty to disclose, a defendant can only be convicted under the concealment prong of section 1001 if he had a duty to disclose the

information he concealed. *See* Pet. 18.[8] This judicially crafted "duty to disclose" requirement, petitioner's argument continues, is a question of fact that must be placed before the jury. Pet. 19-20, citing *United States v. Gaudin*, 515 U.S. 506 (1995), and *Richardson v. United States*, __U.S. __, 119 S. Ct. 1707 (1999).

But the court of appeals did not reach a contrary decision; indeed, it did not reach either of these legal questions at all. Far from violating this Court's earlier rulings, *see* Pet. 17-18, the court of appeals held simply that even if a duty to disclose is an element of a concealment offense and such an instruction should have been given to the jury, any error was harmless under the facts of this case. 16a-17a. In other words, the court assumed *arguendo* that a duty to disclose instruction should have been given. The court's decision, therefore, in no way conflicts with *Gaudin* or *Richardson*.

Petitioner presents no reason for this Court to review the court of appeals' harmless-error determination. He concedes that the omission of an element from a jury charge is subject to harmless-error analysis, *id.* (citing *Neder v. United States*, __U.S. __ 119 S. Ct. 1827 (1999)) and makes no claim that the court of appeals applied the wrong standard in conducting its harmless-error analysis.[9] Instead, petitioner advances only his

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[8] Citing *United States v. Curan*, 20 F.3d 560, 566 (3d Cir. 1994); *United States v. Zalman*, 870 F.2d 1047, 1055 (6th Cir. 1989); *United States v. Nersesian*, 824 F.2d 1294, 1312 (2d Cir. 1987); *United States v. Murphy*, 809 F.2d 1427, 1431 (9th Cir. 1987); *United States v. Hernando Ospina*, 798 F.2d 1570, 1578 (11th Cir. 1986); *United States v. Larson*, 796 F.2d 244, 246 (8th Cir. 1986); *United States v. Anzalone*, 766 F.2d 676, 683 (1st Cir. 1985); *United States v. Irwin*, 654 F.2d 671, 678-79 (10th Cir. 1981).

[9] The court of appeals held that "the absence of a jury instruction on an element of the crime is not reversible error where it is inconceivable that the jury could have found the defendant guilty of the crime without making a finding as to the omitted element," Pet. App. 16a, a test recently reaffirmed by this Court. *Neder*, 119 S. Ct. at 1836 (noting that "functional equivalence" test requires reviewing court to determine whether "other facts found by the jury are 'so closely related' to the omitted element 'that

personal dissatisfaction with the court's factual finding, asserting that the court of appeals could not find the error harmless because "the OIC presented no evidence that Mr. Blackley had a duty to disclose any of the checks he received in 1993 on his SF 278 Form." Pet. 21. But this assertion is sharply refuted by the record.

The government presented ample evidence that petitioner was under a duty to disclose the information he concealed on his Executive Branch Public Financial Disclosure Form. Indeed, the SF-278 itself, Govt. Ex. 34A, expressly provides at its outset:

> Title I of the Ethics in Government Act of 1978, as amended (the 'Act'), 5 U.S.C. App. § 101 et seq., requires the reporting of this information. . . . Knowing and willful falsification of information required to be filed by section 102 of the Act may . . . subject you to criminal prosecution and sentencing under 18 U.S.C. §§ 1001 and 3571.

This form excruciatingly details what is and what is not required to be reported. *Id.* Pertinent to the present case, the SF-278 required petitioner to disclose, *inter alia*, non-investment income exceeding $200 from any one source and gift payments aggregating $100 or more in value from any one source. *Id.* at 6, 8-9. In addition, the government presented witness testimony elucidating petitioner's obligation to accurately disclose this information. 11/21/97 Tr. at 76-96.

Petitioner's factual challenge to the court of appeals' harmless error determination does not warrant certiorari review. *See, e.g., Rose v. Clark*, 478 U.S. 570, 584 (1986) (noting that although Court has authority to perform harmless-error review, it "do[es] so sparingly.")

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no rational jury could find those facts without also finding' the omitted element"), quoting *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993).

III. The Sentencing Issue Does Not Merit Certiorari Review

Petitioner's final argument for certiorari, Pet. 21-30, amounts to dissatisfaction with the court of appeals' affirmance of the district court's upward departure in imposing sentence and the discretion permitted district courts under *Koon v. United States*, 518 U.S. 81 (1996). Both the district court and the court of appeals identified and used the correct legal standards, as set out in *Koon*, in setting and affirming the sentence imposed, and petitioner does not demonstrate to the contrary. Petitioner's only challenge, therefore, is that he disagreed with the district court's finding that departure was warranted on the facts presented by this particular case. Because petitioner fails to point out an important federal question of law or a circuit conflict raised by the D.C. Circuit's affirmance of his sentence, he falls woefully short of requiring review of that sentence by this Court.

The weakness of petitioner's argument is plain from one simple observation — his petition does not even address the Circuit's determination that the fraud guidelines "explicitly contemplate upward departures in circumstances that fall outside the main core" of general fraud offenses. Pet. App. 18a, citing U.S.S.G. § 2F1.1, Application Notes 10, 13. Thus, petitioner's reliance on *Koon*'s assertion that "departures *based on grounds not mentioned in the Guidelines* will be highly infrequent," Pet. 22 (emphasis added), is misplaced. Because the fraud guidelines recognize and even encourage departures under certain circumstances, it was well within the district court's broad discretion to depart, *Koon* 518 U.S. at 95, and no review of the affirmance of that decision is necessary. Petitioner cites no authority to the contrary.[10]

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[10] To the extent that petitioner attempts to rely on *Koon*, he badly miscasts the holding of the case as "confirm[ing] the strict limitations imposed on departures," and argues that the court of appeals "ignored the restrictive standards imposed by *Koon*." To the contrary, *Koon* held that

Ignoring this dispositive point, petitioner focuses on the district court's inability to set sentencing policy. Pet. 24-26. Of course, the district court did not purport to set policy; it fixed a sentence in accordance with the facts of the particular case before it. Neither the district court nor the court of appeals asserted that any factor should always be a basis for departure in fraud cases. Under *Koon*, case-by-case sentencing decisions such as in this case are owed great deference because of the district court's experience in dealing with factual circumstances presented in a multitude of various cases. 518 U.S. at 98-99. If petitioner is correct that departing in a particular case somehow improperly invades the Sentencing Commission's authority by setting "policy" for similar cases in the future, then no sentencing court could ever depart. Petitioner's argument therefore entirely misses the point of *Koon* and raises no meritorious issue.

Finally, petitioner contends that the amount of the departure, eight levels, compels review by this Court. He does not explain, however, how such a decision — applying the facts of this particular case to the guidelines to determine an appropriate departure — raises an important federal question or creates a circuit conflict. The district court and court of appeals observed that the analogous provision of U.S.S.G. § 2C1.2 (governing gratuity offenses) provides an eight level increase for offenses involving officials holding "a high-level decision-making or sensitive position." Although petitioner argues against the appropriateness of such an adjustment in light of the Court's decision in *United States v. Sun-Diamond Growers of California*, -- U.S. --, 119 S. Ct. 1402 (1999), he ignores the fact that such an adjustment is also provided by another analogous provision of the Sentencing Guidelines, U.S.S.G. § 2C1.7(b)(1)(B) (adding eight levels for fraud

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district courts enjoy broad discretion in applying the Sentencing Guidelines to the facts of a particular case, including applying departures for facts not adequately considered by the guidelines or for facts expressly warranting departures under the guidelines — precisely as the district court did in the instant case. 518 U.S. at 98-99.

involving deprivation of honest services by public officials). Petitioner also fails to note that the amount of the district court's departure was predicated on more than simply petitioner's receipt of money from individuals regulated by USDA while he held a high-level public office; the district court also cited as reasons for the amount of departure that: (1) petitioner was informed that he was not allowed to receive the payments; and (2) petitioner lied about receipt of the payments twice while under oath. Pet. App. 18a. The district court considered all of these factors in combination when fixing the amount of departure and the court of appeals, applying the applicable law, concluded that such was not an abuse of discretion. These decisions do not implicate important questions of federal law, nor do they create circuit conflicts. Review by this Court is therefore unnecessary.

CONCLUSION

The petition for writ of certiorari presents no circuit conflicts to resolve, and no important questions of federal law that need answering. It should be denied.

Respectfully submitted,

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WIL FRENTZEN
Associate Independent Counsel

July, 1999

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, As Amended

In re: Alphonso Michael (Mike) Espy Division No. 94-2

Order Appointing
Independent Counsel

Before: SENTELLE, Presiding, and BUTZNER and SNEED, *Senior Circuit Judges.*

Upon consideration of the application of the Attorney General pursuant to 28 U.S.C. § 592(c)(1)(A) for the appointment of an independent counsel with authority to exercise all the power, authority and obligations set forth in 28 U.S.C. § 594, to investigate whether Alphonso Michael (Mike) Espy, Secretary of Agriculture, has committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to the acceptance of gifts by him from organizations or individuals with business pending before the Department of Agriculture; it is

ORDERED by the Court in accordance with the authority vested in it by 28 U.S.C. § 593(b) that Donald C. Smaltz, Esquire, of the Pennsylvania and California bars, with offices at Smaltz & Anderson, 333 South Grand Ave., Suite 3580, Los Angeles, California 90071, be and is hereby appointed Independent Counsel with full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Alphonso Michael (Mike) Espy,

Secretary of Agriculture, has committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to the acceptance of gifts by him from organizations or individuals with business pending before the Department of Agriculture.

The Independent Counsel shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any organization or individual developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation.

The Independent Counsel shall have jurisdiction and authority to investigate any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, in connection with any investigation of the matters described above.

The Independent Counsel shall have jurisdiction and authority to seek indictments and to prosecute any organizations or individuals involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters, including organizations or individuals who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994. It is

FURTHER ORDERED by the Court that the Independent Counsel, as authorized by 28 U.S.C. § 594, shall have prosecutorial jurisdiction to fully investigate and prosecute the subject matter with respect to which the Attorney General requested the appointment of independent counsel, as hereinbefore set forth, and all matters and individuals whose acts may be related to that subject matter,

inclusive of authority to investigate and prosecute federal crimes (other than those classified as Class B or C misdemeanors or infractions) that may arise out of the above described matter, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.

It further appearing to the Court in light of the Attorney General's motion heretofore made for the authorization of the disclosure of her application for this appointment pursuant to 28 U.S.C. § 592(e) and of the ongoing public proceedings and interest in this matter, that it is in the best interests of justice for the identity and prosecutorial jurisdiction of the Independent Counsel to be disclosed.

IT IS SO ORDERED.

Per Curiam
For the Court:

Ron Garvin, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, As Amended

In re: Alphonso Michael (Mike) Espy Division No. 94-2

UNDER SEAL

Before: SENTELLE, *Presiding*, and BUTZNER and FAY, *Senior Circuit Judges*

ORDER

Upon consideration of the Application for Referral of a Related Matter, filed under seal on January 25, 1996, the Opposition of the United States to the Application for Referral, and the Reply in Further Support of the Application for Referral, it is

HEREBY ORDERED that investigative and prosecutorial jurisdiction over the following matter be referred to the Independent Counsel Donald C. Smaltz and to the Office of the Independent Counsel as a related matter pursuant to 28 U.S.C. § 594(e):

> The jurisdiction and authority to investigate and prosecute any violation of any federal law, other than a Class B or C misdemeanor, by any organization or individual, related to any application, appeal, or request for subsidy made to or considered by the United States Department of Agriculture, for which Secretary of Agriculture Alphonso Michael (Mike) Espy and/or his Chief of

Staff Ronald Blackley intervened in the application, approval, or review process.

It is

FURTHER ORDERED that the effect of this order be stayed for 10 days to allow the Attorney General to seek review of this order, if she so chooses.

Per Curiam

For the Court:
Mark J. Langer, Clerk

By

Marilyn R. Sargent
Chief Deputy Clerk